

# PROPOSAL AND RECOMMENDATION OF THE SUPREME COURT EXPLORATORY COMMITTEE ON APPELLATE MEDIATION

## PREAMBLE

The Committee has investigated and has determined that the following circumstances exist, which support the recommendations made in this proposal:

1. In 2003 the Arkansas General Assembly enacted ACT 1179:

### For An Act To Be Entitled

AN ACT TO AUTHORIZE THE TRIAL AND APPELLATE COURTS TO ORDER CERTAIN CASES TO MEDIATION; AND FOR OTHER PURPOSES(emphasis supplied)

### SUBTITLE

AN ACT TO AUTHORIZE THE TRIAL AND APPELLATE COURTS TO ORDER CERTAIN CASES TO MEDIATION(emphasis supplied)

## SUBCHAPTER 2 - DISPUTE RESOLUTION PROCESSES

16-7-201. Legislative purpose and intent.

It is the **intent** of the General Assembly to:

- (1) Encourage and authorize the use of dispute resolution processes throughout this state to resolve disputes, cases, and controversies of all kinds. Such processes include, but are not limited to, negotiation, mediation, conciliation, arbitration, private judging, moderated settlement conferences, med-arb, fact finding, mini-trials, and summary jury trials;
- (2) Encourage the development of new and the improvement of existing processes in this state;
- (3) **Encourage the courts**, the officers and employees of the courts of this state, state and local officers, departments, state and local governments and administrative agencies, state and local enforcement officers and agencies, prosecuting authorities and public defenders, and all other state and local officials, agencies, districts, and authorities **to become versed in, accept, use, develop, and improve processes appropriate to the fair, just, and efficient resolution of disputes, cases, and controversies of all kinds in this state.**

History. Acts 1993, No. 641, § 1.

16-7-202. Duty and authority of the courts.

- (a) It is the **duty** of all trial and **appellate courts** of this state, and they are hereby vested with the authority, to encourage the settlement of cases and controversies pending before them by advising the reference thereof to an appropriate dispute resolution process agreeable to the parties, and, on motion of all the parties, must make such an order of reference and continue the case or controversy pending the outcome of the selected dispute resolution process.
- (b) All courts are further granted the discretionary authority to make, at the request of a party, appropriate orders to confirm and enforce the results produced by such

dispute resolution process.

History. Acts 1993, No. 641, § 2.

2. This Court is always looking for ways to provide better access to our justice system and to improve the way we provide services at all tiers of our court system. Mediation has been hugely successful in numerous jurisdictions as a means of reducing costs, controlling court dockets and providing faster results and greater satisfaction to the litigants. We are currently utilizing this tool at the other two tiers of our court system and it makes sense to do a pilot program at the appellate level.

Other states have already implemented appellate mediation.

3. Prefatory Note to Uniform Mediation Act states in part:

During the last thirty years the use of mediation has expanded beyond its century long home in collective bargaining to become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.

Public policy strongly supports this development. Mediation fosters the early resolution of disputes. The mediator assists the parties in negotiating a settlement that is specifically tailored to their needs and interests. The parties' participation in the process and control over the result contributes to greater satisfaction on their part. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 Ohio St. J. on Disp. Resol. 885 (1998). Increased use of mediation also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. For this reason, hundreds of state statutes establish mediation programs in a wide variety of contexts and encourage their use. *See* Sarah R. Cole, Craig A. McEwen & Nancy H. Rogers, *Mediation: Law, Policy, Practice* App. B (2001 2d ed. and 2001 Supp.)(hereinafter, Cole et al.). Many States have also created state offices to encourage greater use of mediation. *See, e.g., Ark.*

**Code Ann. Section 16-7-101, et seq. (1995);** Haw. Rev. Stat. Section 613-1, *et seq.* (1989); Kan. Stat. Ann. Section 5-501, *et seq.* (1996); Mass. Gen. Laws ch. 7, Section 51 (1998); Neb. Rev. Stat. Section 25-2902, *et seq.* (1991); N.J. Stat. Ann. Section 52:27E-73 (1994); Ohio Rev. Code Ann. Section 179.01, *et seq.* (West 1995); Okla. Stat. tit. 12, Section 1801, *et seq.* (1983); Or. Rev. Stat. Section 36.105, *et seq.* (1997); W. Va. Code Section 55-15-1, *et seq.* (1990).(emphasis supplied)

In some limited ways, the law can also encourage the use of mediation as part of the policy to promote the private resolution of disputes through informed self-determination. *See* discussion in Section 2; *see also* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Disp. Resol. 831 (1998); *Denburg v. Paker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1000 (N.Y. 1993) (societal benefit in recognizing the autonomy of parties to shape their own solution rather than having one judicially imposed).

4. The Uniform Mediation Act also provides the following commentary:

Society at large benefits as well when conflicts are resolved earlier and with

greater participant satisfaction. Earlier settlements can reduce the disruption that a dispute can cause in the lives of others affected by the dispute, such as the children of a divorcing couple or the customers, clients and employees of businesses engaged in conflict. *See generally*, Jeffrey Rubin, Dean Pruitt and Sung Hee Kim, *Social Conflict: Escalation, Stalemate and Settlement* 68-116 (2d ed. 1994) (discussing reasons for, and manner and consequences of conflict escalation). When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. The public justice system gains when those using it feel satisfied with the resolution of their disputes because of their positive experience in a court-related mediation. Finally, mediation can also produce important ancillary effects by promoting an approach to the resolution of conflict that is direct and focused on the interests of those involved in the conflict, thereby fostering a more civil society and a richer discussion of issues basic to policy. *See* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Disp. Resol. 831 (1998); *see also* Frances McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, 3 Disp. Resol. Mag. 12-13 (1997); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 Ohio St. J. on Disp. Resol. 715 (1999); Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000) (discussion the causes for the decline of civic engagement and ways of ameliorating the situation).

State courts and legislatures have perceived these benefits, as well as the popularity of mediation, and have publicly supported mediation through funding and statutory provisions that have expanded dramatically over the last twenty years. *See*, Cole et al., *supra* 5:1-5:19; Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54 (Aug. 1996). The legislative embodiment of this public support is more than 2500 state and federal statutes and many more administrative and court rules related to mediation. *See* Cole et al, *supra* apps. A and B.

## 5. There are advantages in having a mediation program

### ADVANTAGES FOR THE COURT:

- . Docket management and control.
- . Resolves the case without the necessity of judicial labor
- . The dispute is resolved early, thereby allowing the Court to schedule other cases in the allotted time.
- . Voluntary settlements as a result of bargaining by the parties usually do not need post trial enforcement proceedings or appeal and resolve all outstanding issues between the parties.
- . Citizens and attorneys are more satisfied with the "system"

### ADVANTAGES FOR THE ATTORNEYS:

- . Enable them to negotiate a settlement which may be more favorable than their expected result.
- . Facilitates negotiation - forces the creation of an event at which both sides must

- negotiate in good faith.
- . Accomplishes the goal of the client without a disproportionate expenditure of attorney's fees and costs.
- . Client satisfaction - enables the attorneys to deliver a product (resolution of the dispute) favorable to their client and with which their client is satisfied.
- . Provides more effective use of the attorney's time.
- . Provides an opportunity to directly communicate their party's view of the case to the other party or the ultimate decision-maker for that party.
- . Protection of having the client participate in the negotiation process.
- . Durable agreement - no appeal - no collection problem.
- . Prevents settlement negotiation distraction during the trial or appellate process.

#### ADVANTAGES FOR THE PARTIES:

- . Allows them some management control over the resolution of the dispute.
- . Prevents the unlimited exposure and uncertainty of result.
- . Allows them to exert some informed direct influence over the outcome of the dispute after observing the other attorney, the other party, and hearing a capsule discussion of the case with a neutral outsider.
- . Avoids the expense of final attorney preparation.
- . Allows the party to bargain through counsel for certain key elements which are extremely important in exchange for other elements which are less important.
- . Each party gets to see the other's best offer and the parties can decide to take it or to continue to litigate.
- . Enables a party to stop the expenditure of time and personal involvement in the litigation and therefore, exert energies to other business pursuits or other normal activities.
- . Relationships preserved or improved.

6. Alternative Dispute Resolution is gaining greater acceptance. The following example is from Bank of America Outside Counsel Procedures:  
Mediation, binding arbitration and other forms of alternative dispute resolution have proven very beneficial to Bank of America and should be considered at the outset of any engagement and periodically thereafter. Use of alternative dispute resolution is strongly supported by Bank of America. From Bank of America Legal Department Procedures, August 2007. [[http://www.bankofamerica.com/suppliers/index.cfm?template=suprel\\_outside\\_counsel\\_proc.cfm](http://www.bankofamerica.com/suppliers/index.cfm?template=suprel_outside_counsel_proc.cfm)]

7. The Judges of the Arkansas Court of Appeals are supportive of this proposal.

## PROPOSAL

Establish a Voluntary Pilot Appellate Mediation Program in the Arkansas Court of Appeals with funding available from the Clerk of the Court and Alternative Dispute Resolution Commission. The proposed rules and procedures for this voluntary pilot program are attached, together with sample forms, and a proposed per curium order.